

Gupta (Migration) [2021] AATA 1476 (9 March 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Aarti Gupta
VISA APPLICANT:	Mr Gurjeet Singh
CASE NUMBER:	1828682
DIBP REFERENCE(S):	BCC2017/708596
MEMBER:	David Crawshay
DATE OF ORAL DECISION	9 March 2021
DATE OF WRITTEN STATEMENT:	19 March 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 19 March 2021 at 12:36pm

CATCHWORDS

MIGRATION –Partner (Provisional) (Class UF) visa - subclass 309 – parties displayed a detailed and intimate knowledge of each other – parties are validly married – applicants are currently in a genuine spousal relationship– evidence of long-term commitment to a spousal relationship – marriage is valid for the purposes of the Act– decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221

CASES

Bretag v MILGEA [1991] FCA 582

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 September 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 21 February 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because there was insufficient evidence to demonstrate that the visa applicant was the spouse of the review applicant at the time of application. The delegate relied on evidence in the form of a site visit by officers of the Department to the visa applicant's listed residence in India in June 2018 where they interviewed neighbours of the visa applicant's family and his aunt. These people all stated that the visa applicant was not married. Furthermore, the visa applicant's aunt stated that the visa applicant's family is looking for a suitable match. On the basis of this, the delegate had significant concerns about the social recognition of the parties' relationship and was not satisfied that it was genuine and continuing.
4. The review applicant appeared before the Tribunal on 9 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

7. The visa applicant arrived in Australia in October 2008 as the holder of a Higher Education Sector visa (TU-573) which was cancelled in March 2011. From that point until he departed Australia in February 2017, he had been on a bridging E visa (WE-050) that included a "no work" condition among other things. He subsequently availed himself of the option of appealing against the cancellation and then embarking upon a further migration pathway through an onshore visa with his ex-spouse. This process only ended in November 2016 when he withdrew a review application.
8. The review applicant arrived in Australia in November 2011 with her son as the holder of a Higher Education Sector visa (TU-573). A further such visa was applied for and granted before she was granted a Temporary Graduate visa (VC-485) in March 2014 and then a Skilled Independent Work visa (SI-189) in March 2016. In June 2018, she was conferred Australian citizenship.

9. The parties claim to have met in November 2011 after the review applicant had arrived in Australia. They claim that the visa applicant was friends with the review applicant's brother and they saw each other at his place where she was staying – an address in Preston.
10. The parties claim that they began to show feelings for each other in late-2014. By this stage, the review applicant had returned to India to finalise her divorce with her ex-spouse although she claims to have been separated from him since 2010. In March 2015, they claim that the visa applicant moved into the Preston address. On 12 December 2016, the parties were married to each other.
11. The visa applicant travelled out of Australia on 13 February 2017 and the visa was applied for on 21 February 2017. The application was refused on 18 September 2018 and a review of this decision was lodged on 1 October 2018.
12. The review applicant and her son travelled several times offshore since the visa applicant returned to India. Most of these times were to India where she claims to have visited and stayed with the visa applicant, although they also claim to have visited Thailand with the review applicant's son.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the visa applicant is the spouse of the review applicant at the time of application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is now an Australian citizen and was an Australian permanent resident at the time of application.
15. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a copy of a certificate for a marriage that was conducted on 12 December 2016, and is satisfied that the document is genuine and that the parties were free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

17. The evidence in front of the Tribunal is that the parties operated a joint bank account from August 2016 when the visa applicant was still in Australia. At this time, the visa applicant had no work rights and claims to have been relying on payments from his family, including his brother in Australia, and the review applicant. The statements show deposits being made from the review applicant's employer, as well as other transactions to do with groceries, meals, clothing, utilities and other living expenses. More recently, the statements show the same deposits from the same employer, as well as withdrawals being made in Amritsar that are likely by the visa applicant. Furthermore, the Tribunal has seen a number of money transfers from the review applicant to the visa applicant, the earliest of which was sent in March 2017.
18. The evidence also shows that the parties executed wills in October 2016 that made the other party a beneficiary. In August 2016, the review applicant made the visa applicant a beneficiary of her life insurance policy. In January 2017, the review applicant made the visa applicant a beneficiary of her superannuation account.
19. Based on this evidence, the Tribunal finds that the parties do not have any joint ownership of real estate or other assets, nor do they have any joint liabilities. It finds that the review applicant, with others, had been supporting the visa applicant during the time he was in Australia and without work rights, and finds that she continues to offer some monetary support to him from Australia. It accepts that the parties have integrated their finances to some extent albeit that the contributions from the parties are not equal. It finds that the review applicant owes some legal obligations to the visa applicant.
20. The Tribunal is satisfied that the financial aspects of the relationship indicate that the parties have been in a genuine and continuing relationship at the time of application and at the time of this decision.

Nature of the household

21. The parties do not claim to have any children of the relationship. The review applicant has a son whom she claims is the product of a previous relationship. The evidence provided suggests that the visa applicant took an active interest in the care and support of the review applicant's son. At hearing, the review applicant told the Tribunal that the visa applicant is a father figure to her son.
22. The parties have submitted numerous pieces of evidence that seek to attest to them living together at an address in Preston until the visa applicant left Australia in February 2017, including correspondence addressed to them. The parties claim that the review applicant and her brother had been living at this address for a number of years before the visa applicant came to live with them in March 2015. The parties claim that the review applicant's brother moved out thereafter and the parties lived there with the review applicant's son.
23. In her decision, the delegate stated her belief that while the parties had been living together, she was not satisfied that they lived together as spouses. Based on other evidence, some of which was not in front of the delegate, the Tribunal has come to a different conclusion and accepts that the parties had established a common household under the same roof at around the time of application which was just after the visa applicant travelled offshore.
24. In relation to the period after the visa applicant returned to India in February 2017 until now, the Tribunal has considered evidence such as travel documents and photographs showing

that the review applicant has travelled with her son to visit the visa applicant on a number of occasions, as well as to Thailand in late-2019. The Tribunal considers that the parties were able to continue their common household during these times, and at other times were able to offer each other the support such that they did not live separately and apart on a permanent basis.

25. The Tribunal accepts that the evidence provided substantiates a finding that the parties have not been living separately and apart on a permanent basis at the time of application and at the time of this decision.

Social aspects of the relationship

26. The parties have submitted a number of declarations and other letters from friends and family on both sides, as well as a number of the review applicant's co-workers. They have also submitted numerous photographs of themselves and the Tribunal notes that most of these show them in the company of other people and many are taken at social gatherings involving the visa applicant's family in India. These pieces of evidence demonstrate to the Tribunal that the parties have represented themselves to and are recognised by a large number of people as being in a married relationship. They are given substantial weight by it.
27. In terms of the basis on which the parties plan and undertake joint social activities, the Tribunal has considered evidence showing that they have undertaken joint travel to Thailand in late-2019, and have attended social activities while in India. This evidence is given weight.
28. The Tribunal is aware of the delegate's adverse finding in relation to the apparent lack of knowledge of the parties' marriage by the visa applicant's aunt and his erstwhile neighbours (by the time of the site visit, he and his family had moved). To recall, none of the people interviewed in that site visit professed to be aware that he was married at that stage. The Tribunal does not think it is overstating the point to say that this was decisive in the delegate's decision to refuse the visa.
29. The evidence of the parties is that the aunt in question had been involved in a family dispute. An affidavit signed by the aunt in question and dated 30 September 2019 stated that she had told a lie to the Department by saying that she was not aware of the parties' relationship because there were family issues at the time and she "didn't want any good for them". She expressed remorse for her actions. Photographs show the parties with this aunt, and while these may suggest that if there was some type of estrangement then this is over, it could also suggest that the aunt was never estranged and was merely conveying what she thought was the truth at the time of the site visit in June 2018. The latter view appears consistent with what the visa applicant wrote in response to the Department's natural justice letter in 2018 wherein he stated that he never considered it necessary to let his aunt, uncle or their daughter know about his marriage to a divorced lady with a child that was from another religion. However, this is not ultimately what has been submitted by the visa applicant, who has instead argued that the answer given by his aunt was a lie motivated by a family dispute as she knew that he was married to the review applicant but chose not to reveal this.
30. In light of this, the Tribunal has some concerns about the explanation given by the parties and has accorded it some weight of an adverse nature. However, it has balanced this evidence against other evidence that clearly shows the parties as being socially recognised as a married couple in Australia and in India. Moreover, it accords no weight to evidence showing that the neighbours of the visa applicant's family did not recognise the parties' relationship as it is clear that his family had moved some months earlier. The Tribunal finds on balance that the evidence favours a finding that the parties represent themselves to and are recognised by family members, friends and other third parties as being in a married relationship notwithstanding the concerns over the visa applicant's aunt.

Nature of the parties' commitment to each other

31. The Tribunal has considered evidence given by the parties at hearing in relation to the inception and development of their relationship. The review applicant claimed that the parties met in 2011 through her brother, who was friends with the visa applicant. She had recently come out to Australia and was staying with her brother at the Preston address, and the parties would see each other. She said that the parties' relationship began in 2014 and that the visa applicant moved into the Preston address to live with her and her brother in March 2015. The visa applicant spoke to the same facts when questioned.
32. The Tribunal has concerns over when the parties ceased their previous relationships. In the case of the review applicant, she claims that she and her ex-spouse separated in 2010 and, based on the fact that she did not return to India to visit her ex-spouse from the time she travelled to Australia in November 2011 until she went back to India to finalise her divorce in mid-2014, the Tribunal is inclined to believe her. In the case of the visa applicant, however, information from other visa applications showed that he claimed to be in a relationship with his ex-spouse at the same time as claiming to have been in a relationship with the review applicant in late-2014 and into 2015. Nonetheless, the Tribunal is satisfied, based on the preponderance of other evidence, that the parties were in a genuine and continuing relationship at the time the visa was applied for in February 2017. Such evidence takes the form of photographs, financial information and records of communications between the parties on a social media platform. Although the communications records, which are extensive and work out at around 44 messages-a-day over a period of over two years from August 2017 to November 2019, cover a period after the time of application, the Tribunal accepts that they tend logically to show that the parties were communicating extensively with each other at that earlier time: *Bretag v MILGEA* [1991] FCA 582.
33. At hearing, the parties displayed a detailed and intimate knowledge of each other, including their study and employment histories and their families, especially the review applicant's son. What also became clear from questioning of the parties and the review applicant's son in particular was the affection and regard that the review applicant's son has for the visa applicant. The evidence shows that the visa applicant has taken an active role in the care of the review applicant's son, not least because he has been unable to work and has remained at home while the review applicant has been working. The parties submitted copies of several cards written by the review applicant's son while the parties have been apart from each other, and these invariably talk about how much he misses the visa applicant.
34. When asked what attracted her to the visa applicant, the review applicant told the Tribunal that he is really humble and family-oriented. She said that she could not find those qualities in her ex-spouse. She said that he takes care of her and looks after her son more than she does. She said that he "completes" her family. She said that, since he has been in India, he has been looking after her family as he now lives in a town half-an-hour away from them. When asked the same question, the review applicant replied that she was very caring towards him. He said that she had looked after him while he was in Australia. He said that she was a "good wife".
35. Based on this evidence, and on other evidence such as the legal commitments the parties have made to each other such as the beneficiary nominations and the aforementioned communications records, the Tribunal accepts that the parties draw a substantial degree of companionship and emotional support from each other while they have been physically apart from each other and that they regard their relationship as a long-term one. They both appear to have a significant emotional investment in each other, the review applicant's son and their relationship with each other.

36. The Tribunal has considered the evidence in relation to the nature of the parties' commitment to each other and is satisfied that it points to them being in a genuine and continuing relationship at the time of application and at the time of this decision. It accepts that the evidence also shows that they have had a commitment to a shared life as a married couple and that they do not live separately and apart on a permanent basis at those times.

CONCLUSION

37. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. The parties' relationship has been genuine and continuing, they have had a commitment to a shared life as a married couple to the exclusion of all others and they have not lived separately and apart on a permanent basis at the time of application and at the time of this decision.
38. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).